The Planning Inspectorate

Appeal Decision

Inquiry held on 11 January 2017

Site visit made on 11 January 2017

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 17 January 2017

Appeal Ref: APP/L3245/X/16/3147191
Hunky Dory, Tern View, Market Drayton, Shropshire TF9 1DU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 [hereinafter 'the Act'] as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development [LDC].
- The appeal is made by Mr & Mrs C Williams against the decision of Shropshire Council.
- The application [Ref. 15/03780/CPE], dated 1 September 2015, was refused by notice dated 23 November 2015.
- The application was made under section 191(1)(a) of the Act.
- The development for which an LDC is sought is use of private swimming pool at Hunky Dory for providing children's swimming lessons [but see below for revision].
- The evidence was taken on oath from all witnesses who addressed the Inquiry.

Decision

1. The appeal is dismissed.

Preliminary matters

2. Section 7 of the application form indicates that an LDC is sought for an existing use that is said to fall within use class "D2". However the Promap, which accompanied the application, shows the curtilage of Hunky Dory edged red, with the shared access edged blue. It was therefore agreed at the Inquiry that the description should be revised to: *Mixed use of Hunky Dory for residential and of private swimming pool at Hunky Dory for providing children's swimming lessons.* This change reflects the mixed use of the land for a residential and commercial use, including the parking of vehicles belonging to the parents of those who have swimming lessons, which would not be within any use class.

3. At the Inquiry it emerged that a number of local residents had made written representations direct to The Planning Inspectorate [PINS] but that these had not been circulated to either main party and had not been placed before me. On behalf of PINS I apologised for this inaction and I formally do so again now. I have asked my colleagues to instigate an investigation so that lessons can be learnt to avoid such a situation reoccurring. I have obtained confirmation from my colleagues that what I was given at the Inquiry [Document 4] is a full set of the correspondence that has been submitted. I would therefore like to assure all interested parties that I am confident that I have taken account of all of the documents that have been submitted to PINS since this appeal was lodged.

4. There has been reference to Circular 10/97, but this is no longer extant because it has been revoked and replaced by the Planning Practice Guidance ["the Guidance"]. However the relevant evidential tests have not changed.

Background to and identification of the main issues

5. The Guidance says: "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability*"[1]. The test applies equally to an Inspector at appeal.

6. The application is dated 1 September 2015 and so the material date in this appeal is 10-years before this date, i.e. 1 September 2005. On this basis the first main issue is whether, on the balance of probability, the Appellants have discharged the onus of proof to show that the use of the pool for providing children's swimming lessons began prior to the material date and has continued. The second main issue is whether there has been positive deception of the Local Planning Authority such that a principle of public policy, namely that a person should not benefit from their own wrong, is invoked.

Reasons: *(i) Consideration of the first main issue*

7. In closing the Council's closing submissions helpfully broke down the 10-year period at issue for the purpose of analysis and I adopt a similar approach now.

Did the commercial use commence prior to the material date?

8. Section 10 of the application form asks "*When was the use or activity begun?*" to which the answer "31/08/2005" is given. The Council has highlighted that some of the sworn statements that were submitted with the application[2] say that swimming lessons had begun at the property "*prior to*" that date. Whilst it is claimed that this conflicts with the answer given on the application form, I am not convinced that there is a great deal of substance to this point. The application form does ask for a specific date and, on the Appellants' version of events, the lessons had started by that date. At its highest it might be said to be imprecise but, in itself, this is not a sound basis to dismiss this appeal.

9. The more substantive point is whether the activity taking place prior to the material date represented the making of a material change in the use of the land. In evidential terms I consider that the position is clear. Mrs Muir gave evidence that lessons started very soon after the "*Teddy Bears Crash Course*", the certificate for which is dated "*WC 15/08/05*"[3] and that initially it was just her son and the Appellants' daughter who had regular lessons. Mrs Muir's proof of evidence says her daughter: "…*would sometimes get in the pool with Sue* [the swim teacher]*, but did not officially start to have lessons until she turned 3 years in the March of 2006*". She confirms that the initial lessons at the appeal site were weekly and just on a Tuesday afternoon.

10. The Appellant's proof of evidence says that: "*From 2006, I recruited several children…*" and so, on the Appellant's own evidence, she did not recruit any additional swimmers in 2005. At the Inquiry, despite the fact that their proofs of evidence are silent on this point, both the Appellant and Mrs Muir said that the swimming teacher started to bring her own pupils with her to the lessons

[1] Source of quote: paragraph ID: 17c-006-20140306.
[2] At Appendix 16 to Miss Groom's proof of evidence.
[3] Appendix 17 to Miss Groom's proof of evidence.

that were conducted at the appeal site. However they both said that they were unsure when other children started to attend the lessons: the Appellant said it was a few weeks or a few months after the lessons started; Mrs Muir said that she could not say when other children started lessons, but it might have been within 2 weeks or 2 months. What I take from this is that there is no reliable evidence that other children attended the lessons prior to the material date.

11. Adopting the balance of probability it would appear that there were a maximum of 2 swimming lessons provided at the appeal site prior to the material date, which were provided for 2 children, one of whom received the lesson 'in kind'[4]. Whilst I have no reason to doubt that Mrs Muir's daughter might have got in the pool at the appeal site in August 2005 the evidence is that she did not have swimming lessons in 2005. Mrs Muir's proof of evidence describes the Appellant as a: "…*friend of my sister*", but says she has known the Appellant: "…*for about 20 years*" which, given that the proof was written in 2016, would take me back to 1996. So whilst Mrs Muir said she met the Appellant at the swimming pool in Market Drayton and they became friends, they were acquainted before 2005.

12. Taking all of these factors into account I am satisfied, as a matter of fact and degree, that the level of use that took place prior to the material date did not constitute a material change in the use of the land. Essentially 2 parents, who already knew each other, persuaded the swimming teacher to come and give their children some private lessons in the Appellant's own pool with the offer of £5 to essentially cover the teacher's costs. It is not clear at what stage it was said that the teacher could bring her own pupils to future lessons and obtain financial remuneration, but it has not been shown that such use commenced prior to the material date. This alone is a sound basis to dismiss this appeal, but it would be unsatisfactory if I left it there and so I propose to review other aspects of the case and identify when the material change of use took place.

Has the commercial use ceased?

13. At the other end of the period at issue, the Appellants need to show that the use was still subsisting on 1 September 2015, being the date of the application. This is because the test for lawfulness necessarily engages the question as to whether enforcement action, as defined in section 171A(2) of the Act, could be taken. If the use subsisting on the date of the application has reverted to use for a purpose incidental to the enjoyment of the dwellinghouse as such then, by definition, that is not development by virtue of section 55(2)(d) of the Act. Accordingly, if the commercial use had ceased by that date, there would be no breach of planning control against which enforcement action could be taken.

14. The evidential position on this point is more ambiguous. The Appellant was asked about the exchange of emails, culminating in that sent by Miss Groom dated 29 June 2015 [Document 3]. She said that she was sure that she would have abided by it within 2 months of that date, "*definitely*". On the basis of the Appellant's testimony I conclude that paid lessons ceased by 29 August 2015.

15. It would therefore appear that by 29 August 2015 the Appellants had instituted a revised arrangement in which any lessons that did take place after that date were for "*friends and family*", who were asked to make a "*donation*" towards

[4] Week commencing 15/08/2005 means that date was a Monday and so swim lessons might have taken place on Tuesday 23rd and 30th August. The Appellant confirmed that Sue did not charge for her daughter's lessons.

the cost of heating the pool[5]. During my inspection, the donation box was pointed out to me on the table outside of the entrance to the swimming pool.

16. Miss Groom was asked about what level of use the Council would consider to represent the making of a material change in the use of the land. In giving her answer she specifically addressed the arrangement that the Appellant says is currently subsisting, in which use of the pool is restricted to friends and family who are merely asked to make a donation to the running costs. Miss Groom said the Council would regard this level of use to be acceptable and that it was not a material change in the use of the land; I have no reason to disagree.

17. Notwithstanding the clarity of the position that might be said to arise from the above, Mrs Hancock confirmed the contents of her proof of evidence on oath and it says: "*Both of my children had weekly lessons until June 2016*". She was asked whether she paid for the lessons and confirmed that she did[6]. With hindsight all parties realised that the question was not asked as to whether the payment, which I have no reason to doubt was made after 29 August 2015, was placed in the donation box or given in an envelope under the old system. It is material that at that stage her children had been having weekly lessons for over 8 years and so it is conceivable that she is now a friend of the Appellant.

18. I have to assess what, at face value, might be said to be conflicting evidence and the test is that set out in the Guidance, namely the balance of probability. In view of: i) the Appellant's testimony; ii) the existence of the donation box which I saw during my inspection; and, iii) the fact that the date given by Mrs Hancock is so long after the exchange of emails, there is not a sound basis to conclude that the commercial use continued until June 2016. On the balance of probability, I conclude that the commercial use ceased by 29 August 2015 and thereafter the use of the pool has been restricted to friends and family who have merely made a donation towards the cost of heating the pool.

When did the material change of use occur?

19. The Council does not dispute that the use of the pool for children's swimming lessons gave rise to the making of a material change in the use of the land. Miss Groom indicated that the evidence suggests that the material change of use took place during 2011. The evidence to support such a conclusion includes: i) an exchange of emails between the main parties in 2014 in which the Appellant said she: "*…began to teach on 29th July 2011*"[7]; and, ii) this version of events appears to be reflected in the Design and Access Statement [hereafter DAS][8] which, in several instances, says the lessons started in 2011. I propose to examine this evidence further in respect of the second main issue.

20. Miss Groom said in reaching that view she had taken account of the evidence as to the scale and intensity of the use, as well as the complaints that had been received from neighbours. However the complaints only appear to have been made for the first time in 2014. During the site inspection I was given access to the property at Brambleside, amongst others. The view from the window in front of the kitchen sink looks directly across the shared access, which runs at

[5] The words in italics in both paragraphs 14 and 15 are direct quotes of what the Appellant stated on oath at the Inquiry according to my contemporaneous note of the proceedings.
[6] Question put on behalf of the Appellants, according to my contemporaneous note.
[7] Source of quote: Appendix 9 to Miss Groom's proof of evidence.
[8] Submitted with planning application 15/01386/COU, which was subsequently refused and was the subject of an appeal decision [Ref. APP/L3245/W/3140150] dated 24 March 2016, which dismissed the appeal.

a level of circa 1 m above the slab of the dwelling. In other words any vehicle that attends Hunky Dory has to pass along that length of tarmac in full view of that window, which otherwise serves an open plan lounge area. Although Mr Nurser said he works away during the day he said his wife works from home and therefore spends a great deal of time there, and that her arrangements have not changed over the relevant period. In the context of the Appellant's claim that 2011 was probably her busiest period, I find it difficult to reconcile why all of the neighbours, including Mr & Mrs Nurser, only noticed the problem for the first time in 2014. Nevertheless it appears to be common ground that there has been a breach of planning control by 2014 at the very, very latest.

The period up to February 2008

21. In consideration of whether the material change of use took place before 2011 I start my analysis, in the context of my earlier finding, with the period up to February 2008, when the Appellant's father died. The Appellant acknowledges that her record of events during the period 2006 to February 2008 is limited. There is however no reason to doubt that lessons continued throughout this period and, in particular, that the Appellants' daughter only had lessons at home. Although the publicity poster[9] has a written date of "2007" on it, the Appellant said that swimming lessons on a Tuesday and Wednesday took place until 2009, and so I am only able to attach limited weight to the date of 2007.

22. Under cross-examination the Appellant initially agreed she could not remember what was going on in the period up to February 2008. However she later said that she had "*limited recollection*" [10] of that period and claimed that there were weekly swimming lessons on a Tuesday and a Wednesday. In re-examination she agreed that there had been regular lessons. It is clear that the level of use did increase during this period and I test the evidence in what follows.

23. There is no reason to doubt that Mrs Muir's daughter started lessons in March 2006. Ms Currie said that she had seen more than 10 lessons in the 12 month period from summer 2005 to summer 2006. On one occasion she recalled seeing 3 or 4 cars and children when she went to the property to water some plants when the Appellants, and their daughter, were on holiday. Given the terms of her proof of evidence, this appears to have been during the summer of 2006. Even if I assume that this included both of Mrs Muir's children, this suggests there was at least one other child attending paid lessons. Ms Currie confirmed that when she saw the teacher in the kitchen she had envelopes with names on them which, Ms Currie assumes, had payments in them. This is consistent with what Mrs Blaxall and others said was the method of payment.

24. Mrs Blaxall's son started lessons in September 2006 and at that stage I am satisfied from her testimony that consecutive lessons took place as she witnessed other children changing at the end of her son's lesson. Mrs Blaxall confirmed that she was not a friend of the Appellant and had just met her in the playground and been invited to attend the lessons. Mrs Blaxall's evidence is the first clear and unambiguous evidence of a person who is not a friend or family member attending the premises and paying for swimming lessons.

[9] At Appendix 11 to Miss Groom's proof of evidence.
[10] The words in italics are what the Appellant stated on oath at the Inquiry, according to my contemporaneous note.

25. Aside from the sworn evidence a number of letters have been submitted as part of the application, but because they are not sworn I attach limited weight to the contents of that correspondence. Mrs Blaxall's letter dated 3 August 2015 says that she is unsure which day of the week her son's lessons were on. Mrs Muir's letter dated 10 August 2015 says her daughter's lessons normally followed those of her brother on a Tuesday afternoon. Mrs Shelley's letter dated 5 August 2015 says her son's lesson was on a Tuesday, starting in September 2006. Mrs Harding's letter dated 19 August 2015 says her son attended lessons from the end of 2005 and that he was in a class with 3 other children, but it is not said on what day of the week those classes took place.

26. The "*Schedule of submitted evidence in letters/email information*" might be taken to suggest that Melanie Ingham and Carly Skitt started swimming lessons in 2005, but any such inference would be incorrect. Carly Skitt confirmed on oath that the first lesson she saw take place was in 2009. Melanie Ingham's statutory declaration says the Appellant told her about the lessons on 24 August 2005 and that she saw new swimming aids when she used the pool in December 2005. That is broadly consistent with my understanding, but she clearly says her children did not attend the lessons. Both Melanie Ingham and Carly Skitt are members of the Appellant's family and so their use of the swimming pool at the premises is an incidental purpose.

27. The Appellant's letter dated 28 October 2015 says: "*It was not long at all that the lessons/days 'filled up' and swimming lessons were increased in number each day and in the number of days per week*"[11]. I might be reading a lot into that sentence but the order of change might be significant. However, as I have noted, the Appellant admits that she has limited recollection of this period and hence whilst there is evidence of 2 lessons being convened on one day, I can find no clear evidence that lessons were held on more than one day. So whilst the Appellant claimed that the poster might have been as early as 2006 that is not supported by any other evidence before the Inquiry. I conclude that at least up until the end of 2006 lessons were confined to a Tuesday afternoon.

28. The additional evidence for 2007 is solely from unsworn correspondence. Sarah Clarke's letter dated 19 August 2015 says that her children attended lessons from February 2007 for a period of 12 months, but it does not say which day of the week they attended. Sheila Longland's letter dated 25 August 2015 says her daughters attended lessons between April 2007 and July 2008, but it does not say which day of the week they attended. Mrs Ragbourne's letter dated 8 August 2015 says her daughter had lessons from September 2007 until July 2012, but it too does not say which day of the week they attended. So this correspondence does not materially change the position.

29. In closing the Council submitted that the material change of use did not occur in the first few months after the material date; I agree. However Mrs Blaxall's evidence, to which I attach significant weight, does suggest that the use was at least getting near the threshold in September 2006. Nevertheless the use appears to have been for part of one afternoon, one day a week. The unsworn correspondence that I have reviewed does not demonstrate that lessons were taking place on Wednesdays up to and including February 2008. Whilst the use was growing and at least one person who was not family or a friend was paying to attend lessons, as a matter of fact and degree, it has not been shown that

[11] Source of quote: letter at Appendix 22 to Miss Groom's proof of evidence.

this constituted the making of a material change in the use of the land. In this context the analogies given in closing for the Council, for example to a private tutor or a musician having paid students at their home, are apt. For these reasons the Appellants have therefore failed to discharge the onus of proof.

The period from February 2008

30. The submitted Schedule identifies 4 letters from parents whose children are said to have started swimming in 2008. Of these I attach significant weight to the sworn evidence given by Mrs Hancock at the Inquiry. She says that her children attended every Thursday evening from April 2008[12], which is the first clear and unambiguous evidence of swimming lessons being convened on a day of the week apart from Tuesday. I appreciate that the poster might suggest that the sequence was that the first day that swimming lessons were started apart from Tuesdays was on Wednesdays. However there is no other evidence to support that contention and, given that the Appellant admits she has limited recollection for the period up to February 2008, that alone is not enough. In any event the Appellant's concession that the poster might have been as late as 2009 might suggest that the lessons on Wednesdays might not have started until 2008. As such there is no obvious inconsistency in this evidence.

31. Mrs Muir's evidence is that her youngest son had begun swimming lessons in May 2008. Mrs Joyce says her 3 children took swimming lessons from the summer of 2008 and Mrs Davies says her son started having lessons every Wednesday afternoon from November 2008. Whilst unsworn, this is the first clear evidence of swimming lessons being convened on Wednesday afternoons.

32. So by November 2008, at the latest, the evidence suggests that swimming lessons were taking place on at least 3 days a week: Tuesdays, Wednesdays and Thursdays. By my calculation, based on the evidence before me, there is evidence of at least 16 children having paid for swimming lessons in the pool by this date[13]. Of those Mrs Muir, Mrs Blaxall and Mrs Hancock have all given sworn evidence of having paid for swimming lessons. In my view this suggests that the material change of use might have taken place during 2008, possibly as early as May but, adopting the balance of probability, before November.

33. The Appellant's sworn proof of evidence supports such a finding, insofar as she says she recruited "*lots of children*" from Hinstock Hedgehogs Nursery, where she started working in April 2008[14], and that these made up 70 % of the total. It appears to be an admission that the number of children attending swimming lessons materially increased during 2008 to the point where 70 % of them had been obtained by the Appellant as a result of her contact with parents at the school. It follows that those children could not have started before April 2008 and hence the number of children attending before that date, whether recruited by the swimming instructor or otherwise, would have been relatively small.

[12] I note that in this respect her sworn proof of evidence differs from her letter dated 5 August 2015, which says that the initial lessons were on Tuesday evenings from April 2008. Nevertheless, because the contents of that letter are unsworn, it is appropriate to attach greater weight to the contents of her sworn proof of evidence.
[13] Apart from the Appellant's daughter, these are: Mrs Muir's 3 children; Mrs Harding's son; Mrs Blaxall's son [up to December 2007]; Mrs Shelley's son; Mrs Clarke's children [I shall assume 2 children, as the letter is not more precise, up to February 2008]; Mrs Longland's 2 daughters [up to July 2008]; Mrs Ragbourne's daughter; Mrs Hancock's son; Mrs Joyce's 3 children; and Mrs Davies' son.
[14] Date taken from paragraph 1.10 of the Appellant's proof of evidence but confirmed by her letter at Appendix 22 to Miss Groom's proof of evidence.

34. I have considered the possibility that the reference to 70 % in the Appellant's proof of evidence might be to say that by this stage she had recruited 70 % of the children, including those, such as Mrs Muir, who had started before 2008. However, taking account of the evidence that some of those children, such as those of Mrs Blaxall and Mrs Clarke, had stopped attending by March 2008, and that the only evidence for additional days is after this date, this does not alter my view that the material change of use probably took place during 2008.

35. I further acknowledge that the identification of this date ties in with the period that the Appellant can recall names of parents who attended and that it is possible that the swimming teacher recruited most children prior to April 2008. However, albeit for reasons that I do understand, the swimming teacher has not been called to give evidence and, as a direct result, the evidence for the period up to this date is vague. As the onus of proof falls on the Appellants to demonstrate their case there can be no question of somehow giving them the benefit of the doubt. Whilst this might appear insensitive, that is the nature of this type of application, which is declaratory of certain rights in law and so, case law confirms, broader human rights considerations are not engaged.

Other matters

36. In reaching the conclusion that the material change of use occurred well before 2011, as claimed by the Council, I have also had regard to the evidence of the use between 2008 and 2011. It is material that Carly Skitt confirmed on oath that lessons were being run regularly on at least 3 days a week by June 2009. Other evidence that I have reviewed above has enabled me to date the start of lessons on other days more accurately. The contact lists for swimming classes on Tuesdays and Wednesdays in 2009[15] confirm that by this stage there were multiple classes taking place each day. Excluding the Appellant's daughter, the lists contain the names of 27 children names attending 6 swimming classes on a Tuesday and the names of 28 children attending 6 swimming classes on a Wednesday. The names of parents and guardians, together with details of telephone numbers, which I have no reason to set down in a public document, gives a degree of precision and legitimacy to the evidence for that period. In my view this is clear confirmation that the material change of use occurred well before 2011.

37. Looking at the situation the other way it is also material that the Appellant agreed that there was a 'substantial difference' between the scale of activity at the start of the 10-year period, immediately after the material date, and 2011. Similarly Mrs Muir who, out of those who have given sworn evidence is the only other person who can compare the use in 2011 with that immediately after the material date, agreed that there has been a 'significant increase' in the level of the use over that time frame. This is entirely consistent with my finding that the material change of use occurred at some stage between those years[16].

38. In reaching the view that I have expressed I have taken account of all other documentary evidence. Amongst other things the Appellant's recollection that the swimming instructor had public liability insurance through the ASA is a

[15] Appendix 13 to Miss Groom's proof of evidence has been redacted but the original contact list, including all the contact information, has been provided as part of the appeal documentation that was submitted by the Appellant as part of her appeal.
[16] Note: the weighting is put in 'single quotes' to reflect the fact that, according to my contemporaneous note, it was put that way in the questions that were put to the respective witnesses, rather than in their answers.

complete answer to the absence of such documentation prior to 2011, when the Appellant appears to have taken a far more active role in the lessons.

Overall finding on the first main issue

39. On the first main issue I conclude, on the balance of probability, that the Appellants have not discharged the onus of proof to show that the use of the pool for providing children's swimming lessons began prior to the material date. I have given reasons for finding that the material change of use probably took place after April 2008, possibly as early as May but probably before November. I have also given reasons why the use might not have subsisted at the date of the application but, in view of my broader conclusion, even if I might be wrong about that, it is clear that the appeal cannot succeed on the basis upon which it has been advanced. Although the Council has pointed to a later date, and local residents a later date again, upon which it is said that the material change of use occurred, this does not alter my finding on this issue.

(ii) Has there been positive deception?

40. Given my findings on the first main issue it is not necessary for me to reach a view on this second main issue because the appeal cannot succeed. The Council is not time barred from initiating enforcement action if there was evidence of a continuing breach and the Council considered it expedient to do so. However, again, I consider it is appropriate for me to express a view on what is a principal determining issue on which I heard evidence at the Inquiry although, given my finding on the first main issue, I do so fairly briefly.

41. The case of *Welwyn Hatfield v SSCLG & Beesley* [2011] UKSC 15 held that in appropriate cases the principle of public policy that a person should not benefit from their own wrong can be relied upon to defeat an application for an LDC. Lord Mance, who gave the leading judgement, held that the so-called Connor principle may apply in cases where there was: "…*positive deception in matters integral to the planning process*…[which] *was directly intended to and did undermine the regular operation of that process*". Lord Brown held that the principle: "…*should only be invoked in highly exceptional circumstances*" [17]. However this is not a case that meets those tests for the following reasons.

42. The basis for this claim that is evident in the Council's proof of evidence is by reference to the exchange of emails between the Council and the Appellant in May 2014[18]. The Council asked: "*1. Are you running swimming lessons or activities from your domestic swimming pool? 2. If yes, what date did the operations begin?*" The Appellant answered: "*1. I do teach swimming from my domestic pool. 2. I began to teach 29th July 2011*".

43. I am satisfied that the Appellant did not intend to mislead the Council when she gave those answers. I consider that there is a degree of ambiguity in the way in which those questions have been asked. The Appellant took the questions to relate to her own activity, in personally running the swimming lessons, and hence failed to mention the swimming lessons that another person ran from her pool at an earlier stage. Indeed I note that in closing for the Council it was accepted that this was one interpretation of the manner in which the questions could be read. It is relevant that the 2 questions are linked ['If yes…'] and Miss

[17] Source of quotes: paragraphs 56 and 84, respectively.
[18] Appendix 9 to Miss Groom's proof of evidence.

Groom fairly acknowledged that the second does follow from the first. Even if it might be said that it did deceive there was plainly no intention to do so.

44. At the Inquiry a fresh basis for that argument was advanced by reference to the DAS. Section 2 thereof says: "*In 2011 as a result of illness to Mr Williams, Mrs Williams started using the swimming pool to provide lessons, teaching children to swim* … [and having provided lessons] *since 2011 Mrs Williams has established an excellent reputation amongst the local community*". Section 5 continues by saying the: "…*use of the swimming pool for lessons is considered to be an appropriate use and has been undertaken for a continuous period over the last 3 years without complaint*". This is reflected in paragraph 1.2 of the Committee report[19] and hence it was material to the Council's assessment.

45. First I accept that the DAS was prepared for the Appellants, as is evident from the cover thereof insofar as it says: "*On behalf of Mr & Mrs Williams*". Although the DAS was prepared by an Agent it is clear that its contents were prepared based on the Appellants' instructions and they are ultimately responsible for the accuracy of its factual content. It is unclear whether the Agent that drafted the DAS had sight of the email exchange from 2014 but, adopting the balance of probability, I think it more likely than not that he did and that the contents of the DAS was informed by what those emails said. So whilst the Appellant said on oath that she told the Agent that the use had been operated since 2005 this is a possible, and in my view the most likely, explanation as to why the Agent expressed the DAS in the way that he did in 2015. The statement in section 5 merely follows from what is said in section 2 of the DAS. For these reasons I am not convinced there was any intention by the author of the DAS, or the Appellants, to undermine the regular operation of the planning process.

46. I record that, in answer to the question that the Council was misled because if the DAS had said the use had commenced in 2005 the Council might have issued an enforcement notice, the Appellant said: "*I can see that now*". She also acknowledged that she could see where the Council was coming from, in claiming that it was misled by the reference to 2011 in the DAS. However I am not convinced that the Appellants made a positive misleading statement that was intended to mislead at any stage.

47. The Council says that it has worked compassionately and patiently with the Appellants throughout the process; I agree. However in answer to my question at the Inquiry Miss Groom indicated that this was a reason why it had not issued a Planning Contravention Notice [PCN]. There is however a material difference between issue of a PCN and resorting to enforcement action, as defined in section 171A(2) of the Act. Amongst other things a question as to when any such use began, as per section 171C(3)(b) of the Act, might, if the answer had been 2011, have given the Council a sound basis for making out its case under this head. Whilst I recognise that issue of a PCN is discretionary perhaps, with hindsight, the Council might find that such a course of action might have been appropriate given the circumstances that now prevail.

48. On the second main issue I conclude that there has not been positive deception of the Local Planning Authority such that the principle of public policy, namely that a person should not benefit from their own wrong, should be invoked.

[19] Appendix 2 to Miss Groom's proof of evidence.

The way forward

49. Even if the position might be ambiguous as to whether payment, distinct from a donation, was being made after August 2015, there is no ambiguity in the Appellant's unqualified statement on oath that paid lessons have now stopped and that such use as does now occur is solely by friends and family. Although Mr Nurser has suggested that the level of use now subsisting remains above that which occurred in 2005 there is no objective evidence, such as a log of activity, to demonstrate that. On the basis of the Appellant's evidence it would however appear that the commercial use has now ceased and that might be material to any future assessment as to the continuity of any unlawful use.

50. In the context of this decision and the dismissed section 78 appeal decision, the Appellants should be under no illusion that any future resumption of the commercial use might now result in enforcement action. The reasonableness of an appeal against any enforcement notice would need to be assessed against pertinent advice in the Guidance. Moreover, whilst a civil matter, I am aware that a solicitor has written to the Appellants with regard to a potential breach of certain restrictive covenants. So whilst the dismissal of this appeal would not result in a requirement to desist the commercial use, because no enforcement action has been taken, the Appellants should take advice from their Agent and/or the Council before consideration is given to any resumption of that use.

51. I would add that in consideration of who is a 'friend', it might be beneficial if the Appellants were to keep a record of who, apart from their own family, uses the pool and potentially makes a donation towards its running costs. There is plainly scope for dispute in this matter going forward, which is why, unusually, I believe it is appropriate to set down these views now in order to avoid the possibility of enforcement action being required and hence any further appeal.

Conclusion

52. For the above reasons, having regard to all other matters raised, I am satisfied that the Council's refusal to grant an LDC for the mixed use of Hunky Dory for residential and of private swimming pool at Hunky Dory for providing children's swimming lessons was well founded. The appeal fails and I shall exercise the powers transferred to me in section 195(3) of the Act.

Pete Drew
INSPECTOR

APPEARANCES

FOR THE APPELLANTS:

Mrs Christine Williams BSc (Hons) MRTPI	Christal Planning Services Limited.
She called:	
Mrs Amanda Williams	Joint Appellant[20].
Ms Berny Currie	Maddie's Godmother.
Mrs Andrea Blaxall	Parent of swimmer.
Carly Skitt	Appellants' daughter.
Mrs Stephanie Muir	Parent of swimmers.
Mrs Sarah Hancock	Parent of swimmers.

FOR THE LOCAL PLANNING AUTHORITY:

Killian Garvey	Counsel.
He called:	
Alison Groom	Planning & Enforcement Officer, Shropshire Council.

INTERESTED PERSONS [THOSE WHO ADDRESSED THE INQUIRY]:

Ian Nurser	Local resident.
Andrew Parton	Local resident.
Ian Parton	Local resident.

DOCUMENTS SUBMITTED AT THE INQUIRY

Document	1	Council's letter of notification dated 30 November 2016.
Document	2	Opening statement on behalf of the Appellants.
Document	3	Email exchange from June 2015, which was submitted by the Council at the Inquiry.
Documents	4.1-4.5	Bundle of letters from interested parties, which were submitted by the Council at the Inquiry.

[20] Insofar as I have referred to the Appellant, singular, in my main reasoning, this is to Mrs Amanda Williams.